U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34946135

Date: DEC. 5, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner, an author, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the Petitioner satisfied at least three of the initial evidentiary criteria, as required, he did not show his sustained national or international acclaim and demonstrate he is among the small percentage at the very top of the field of endeavor. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of achievements in the field through a one-time achievement (that is, a major, internationally recognized award) or qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

Because the Petitioner has not claimed or established his receipt of a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director determined the Petitioner met three of the four claimed evidentiary criteria: published material under 8 C.F.R. § 204.5(h)(3)(iii), original contributions of major significance under 8 C.F.R. § 204.5(h)(3)(v), and display under 8 C.F.R. § 204.5(h)(3)(vii). Although the Director explained why the Petitioner did not satisfy the high salary criterion under 8 C.F.R. § 204.5(h)(3)(ix), the Director did not provide a discussion for the favorable criteria determinations.

For the reasons discussed below, the Petitioner has not established his satisfaction for at least three categories of evidence. In addition, the Petitioner submits new evidence and argues new eligibility claims on appeal. Because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence and make these claims, we will not consider them for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial").

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

As indicated above, the Director determined the Petitioner fulfilled this criterion. Because the record does not contain published material about the Petitioner relating to his work, we will withdraw the Director's favorable decision for this criterion.

The record reflects the Petitioner submitted seven screenshots of articles from the following websites: chosun.com, hani.co.kr, cine21.com, gokorea.kr, artinsight.co.kr (2), and munhaknews.com. All of the articles discuss, comment, or critique the Petitioner's two books – [redacted] and [redacted] Although the material briefly indicates the Petitioner as the author of the books, they do report, discuss, or cover him or otherwise reflect published material about him. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien."[1] We consider the term "published material about the alien" using their ordinary, common meaning. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . ."). In this case, the articles are about the books rather than about the Petitioner.[2] *See, e.g., Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles regarding a show are not about the actor).

Accordingly, we withdraw the Director's favorable determination for this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

USCIS determines whether the person's salary or remuneration is high relative to the compensation paid to others working in the field.[3] The Petitioner provided the sales revenue for [redacted] In addition, the Petitioner submitted a publishing agreement between [redacted] (publisher) and the Petitioner reflecting the publisher would pay the Petitioner 3 million KRW as a down payment and:

> [Publisher] shall pay [Petitioner] as royalties an amount equal to 10% of the list price of the paper book of this work multiplied by the publishing number. However, if the book is sold in more than 50,000 copies (starting from 50,001 copies), an additional 1% royalties (total 11%) are paid, and if not more than 100,000 copies are sold (starting from 100,001 copies), an additional 1% is paid (total of 12%).

The Petitioner also presented average hourly and annual salary data for writers in South Korea and the United States. However, the Petitioner did not submit the proper comparative data based on his type of compensation. Specifically, the Petitioner did not earn an hourly, monthly, or annual salary, nor was the Petitioner compensated at a traditional hourly, monthly, or annual rate. Rather, as indicated above, the Petitioner received a down payment and royalties, depending on the sold copies of his book. Thus, in order to demonstrate eligibility for this criterion, the Petitioner must show that he has commanded significantly high remuneration for services rather than commanding a high salary since he does not receive an hourly or yearly salary. Because the Petitioner did not compare his down payment or royalty terms or his actual royalty payments "in relation to others in the field," the Petitioner did not establish he has commanded significantly high remuneration.

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[1] *See also generally* 6 *USCIS Policy Manual, supra*, at F.2(B)(1) (indicating that USCIS determines whether the published material was related to the person and the person's specific work in the field for which classification is sought).

[2] Here, the evidence solely discussing the Petitioner's books relate more to establishing original contributions of major significance in the field under 8 C.F.R. § 204.5(h)(3)(v), which the Petitioner also claimed, rather than under the published material criterion.

[3] *See* 6 *USCIS Policy Manual, supra*, at F.2(B)(2).

For these reasons, the Petitioner did not demonstrate he satisfies this criterion.

III. CONCLUSION

The Petitioner did not establish he satisfies two categories of evidence, discussed above. Because the Petitioner cannot fulfill the initial evidentiary requirement of three under 8 C.F.R. § 204.5(h)(3), we need not decide on the Director's favorable conclusions for the original contributions and display criteria. We also need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Accordingly, we reserve these issues.[4]

Nevertheless, we have reviewed the record in the aggregate, concluding it does not support a conclusion that the Petitioner has established the acclaim and recognition required for the classification sought. The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than those progressing toward the top. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021), *aff'd*, 2023 WL 1156801 (D.C. Cir. Jan. 31, 2023) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball coach). Here, the Petitioner has not shown the significance of his work is indicative of the required sustained national or international acclaim or it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate the Petitioner has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The record does not contain sufficient evidence establishing the Petitioner among the upper echelon in his field.

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[4] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternative issues on appeal where applicants do not otherwise meet their burden of proof).